

Message Text

CONFIDENTIAL

PAGE 01 BONN 04394 01 OF 02 111519Z
ACTION SS-25

INFO OCT-01 ISO-00 SSO-00 /026 W
-----111521Z 125941 /44
O R 111506Z MAR 77
FM AMEMBASSY BONN
TO SECSTATE WASHDC IMMEDIATE 6401
INFO USMISSION USBERLIN

C O N F I D E N T I A L SECTION 01 OF 02 BONN 04394

STADIS

EXDIS

DEPT FOR EUR/CE-JOHN KORNBLUM AND L/M-JEFF SMITH

E.O. 11652: XGDS 2 AND 3
TAGS: PINT, US, GW
SUBJECT: APPROACH TO FRG ON G-10 INTELLIGENCE
MATERIALS

1. DURING MEETING AMONG US AGENCIES IN BONN MARCH 9
TO DISCUSS CURRENT LITIGATION IN WASHINGTON (BDC V.
BROWN), LAMBERTH FROM US ATTORNEY'S OFFICE ARGUED
THAT DEPT SHOULD NOW PROCEED WITH REQUEST TO FRG THAT
GERMAN GOVERNMENT AUTHORIZE USE IN OPEN COURT OF
CLASSIFIED G-10 MATERIALS AND INFORMATION WHICH HAVE
BEEN PROVIDED BY FRG IN CONFIDENCE TO USG.

2. DEPTOFF EXPRESSED VIEW THAT DEPT REMAINED WILLING
TO APPROACH FRG WITH SUCH A REQUEST ON BEHALF OF US
ATTORNEY AT APPROPRIATE TIME IN CONNECTION WITH
DISCOVERY IN BDC CASE. HOWEVER, DEPTOFF POINTED OUT
THAT SUCH AN APPROACH NOW WOULD BE PREMATURE, CITING
THE FOLLOWING REASONS:
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PAGE 02 BONN 04394 01 OF 02 111519Z

(A) DISCOVERY HAS BEEN STAYED IN BDC CASE
PENDING DECISION ON APPEAL OF JUDGE JONES' RULING,
INCLUDING HIS DENIAL OF ABSOLUTE IMMUNITY TO DEFENDANTS
SUED IN THEIR INDIVIDUAL CAPACITY;

(B) THE DEADLINE FOR FILING OF BRIEFS AND ARGU-

MENT OF THAT APPEAL HAS BEEN EXTENDED TO 45 DAYS AFTER A DECISION HAS BEEN MADE BY THE DC CIRCUIT COURT OF APPEALS IN THE EXPEDITIONS UNLIMITED CASE SINCE THAT COURT'S DECISION ON ABSOLUTE IMMUNITY WILL BE DIRECTLY RELEVANT TO THE BDC CASE;

(C) THE US SUPREME COURT HAS GRANTED A WRIT OF CERTIORARI IN ANOTHER CASE WHERE A MAJOR ISSUE IS THE QUESTION OF ABSOLUTE IMMUNITY. THERE IS A STRONG LIKELIHOOD THAT THE CIRCUIT COURT'S DECISION IN THE EXPEDITIONS UNLIMITED APPEAL WILL BE DEFERRED UNTIL THE SUPREME COURT HAS RENDERED ITS DECISION ON THAT ISSUE;

(D) TAKEN TOGETHER, THESE APPEALS MAY TAKE SEVERAL YEARS TO DECIDE, DURING WHICH DISCOVERY WILL REMAIN SUSPENDED. FURTHERMORE, IF INDIVIDUAL DEFENDANTS PREVAIL ON ABSOLUTE IMMUNITY ISSUE, THE CASE AS TO THEM WILL BE DISMISSED. IN THAT EVENT, IT IS THE PRESENT JUDGMENT OF THE ASSISTANT US ATTORNEY THAT THE DEPT OF DEFENSE WOULD DEFAULT OR SETTLE THE CASE, COMPLETELY OBTAINING THE NEED TO PRODUCE CLASSIFIED DOCUMENTS IN COURT;

(E) THE REASON ORIGINALLY STATED BY THE US ATTORNEY'S OFFICE FOR THE REQUEST THAT THE DEPT PROMPTLY SEEK THE FRG'S AUTHORIZATION IN PRINCIPLE TO USE CLASSIFIED G-10 DOCUMENTS AND INFORMATION IN COURT WAS TO BE ABLE TO SHOW TO THE COURT THAT THE USG CONFIDENTIAL

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PAGE 03 BONN 04394 01 OF 02 111519Z

HAD NOT BEEN DILATORY SHOULD DISCOVERY BE ORDERED TO PROCEED ON SHORT NOTICE;

(F) IN VIEW OF THE STATE OF THE LITIGATION, THE REASON FOR AN EARLY APPROACH TO THE FRG NO LONGER APPLIES. FURTHERMORE, A RULING ON APPEAL FAVORABLE TO THE INDIVIDUAL DEFENDANTS WOULD RENDER THE WHOLE ISSUE MOOT;

(G) UNDER THE CIRCUMSTANCES, THE APPROACH TO THE FRG SHOULD BE DEFERRED UNTIL THE ABSOLUTE IMMUNITY ISSUE IS DECIDED AND THERE IS A REAL LIKELIHOOD THAT DISCOVERY WILL PROCEED.

3. HOWEVER, LAMBERTH POINTED OUT THAT DEPT'S WILLINGNESS TO APPROACH FRG ON BEHALF OF US ATTORNEY AT EARLY DATE ON THIS ISSUE HAD ALREADY BEEN EXPRESSED

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PAGE 01 BONN 04394 02 OF 02 111518Z
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INFO USMISSION USBERLIN

C O N F I D E N T I A L SECTION 02 OF 02 BONN 04394

STADIS/////////////////////////////////
EXDIS

TO INDIVIDUAL DEFENSE COUNSEL IN SEVERAL LETTERS FROM
THE US ATTORNEY'S OFFICE, WHICH INDIVIDUAL COUNSEL
HAD FILED WITH THE COURT. HE INDICATED IT WOULD BE
EMBARRASSMENT TO US ATTORNEY'S OFFICE IF APPROACH NOT
MADE SOON.

4. AFTER LENGTHY DISCUSSION, LAMBERTH STATED THAT ONE
OF HIS REAL CONCERNS WAS HOW HE WOULD EXPLAIN TO THE
COURT OR INDIVIDUAL DEFENSE COUNSEL STATE'S
"REFUSAL" RPT "REFUSAL" TO SEEK GERMAN AUTHORIZATION TO
USE DOCUMENTS IN OPEN COURT. USBER LEGAL ADVISER
SUGGESTED THAT IF IT BECAME NECESSARY LAMBERTH COULD
REPLY ALONG FOLLOWING LINES:

(A) STATE HAS NOT RPT NOT REFUSED TO SEEK FRG
AUTHORIZATION ON MATTER; RATHER, IT REMAINS PREPARED
TO DO SO AT APPROPRIATE TIME;

(B) HOWEVER, IT WOULD BE PREMATURE TO DO SO NOW
SINCE DISCOVERY LIKELY NOT TO GO FORWARD FOR
CONSIDERABLE TIME AND, IN FACT, MAY BECOME MOOT
DEPENDING ON EVENTUAL RULING ON ABSOLUTE IMMUNITY
ISSUE;

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PAGE 02 BONN 04394 02 OF 02 111518Z

(C) GENERAL APPROACH TO FRG NOW, ESPECIALLY WHEN GERMANS REALIZE ISSUE MAY BECOME MOOT, ONLY INCREASES LIKELIHOOD THAT FRG WILL DENY AUTHORIZATION;

(D) DEFERRAL OF APPROACH TO FRG DOES NOT WORK TO DISADVANTAGE OF INDIVIDUAL DEFENDANTS SINCE THEIR COUNSEL AFTER SIGNING SECRECY AGREEMENT HAVE ACCESS TO THE CLASSIFIED MATERIAL, AND THEREFORE THEY WILL NOT BE HINDERED IN PREPARING THEIR CASE.

5. IT WOULD BE PREFERABLE TO DELAY US ATTORNEY LETTER TO INDIVIDUAL DEFENSE COUNSEL ON THIS MATTER UNTIL EUR/CE OFFICER (CHESTER) RETURNS TO DEPT MARCH 28. HOWEVER, IF DEPT DEEMS IT NECESSARY TO PROCEED SOONER, SUGGEST MICHAEL KOZAK (L/EUR, PRESENTLY DETAILED TO PANAMA CANAL TREATY NEGOTIATIONS) ALSO BE CONSULTED AS HE HAS FULL BACKGROUND ON ISSUE.
STOESSEL

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